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No. 346

In the Supreme Court of the United States

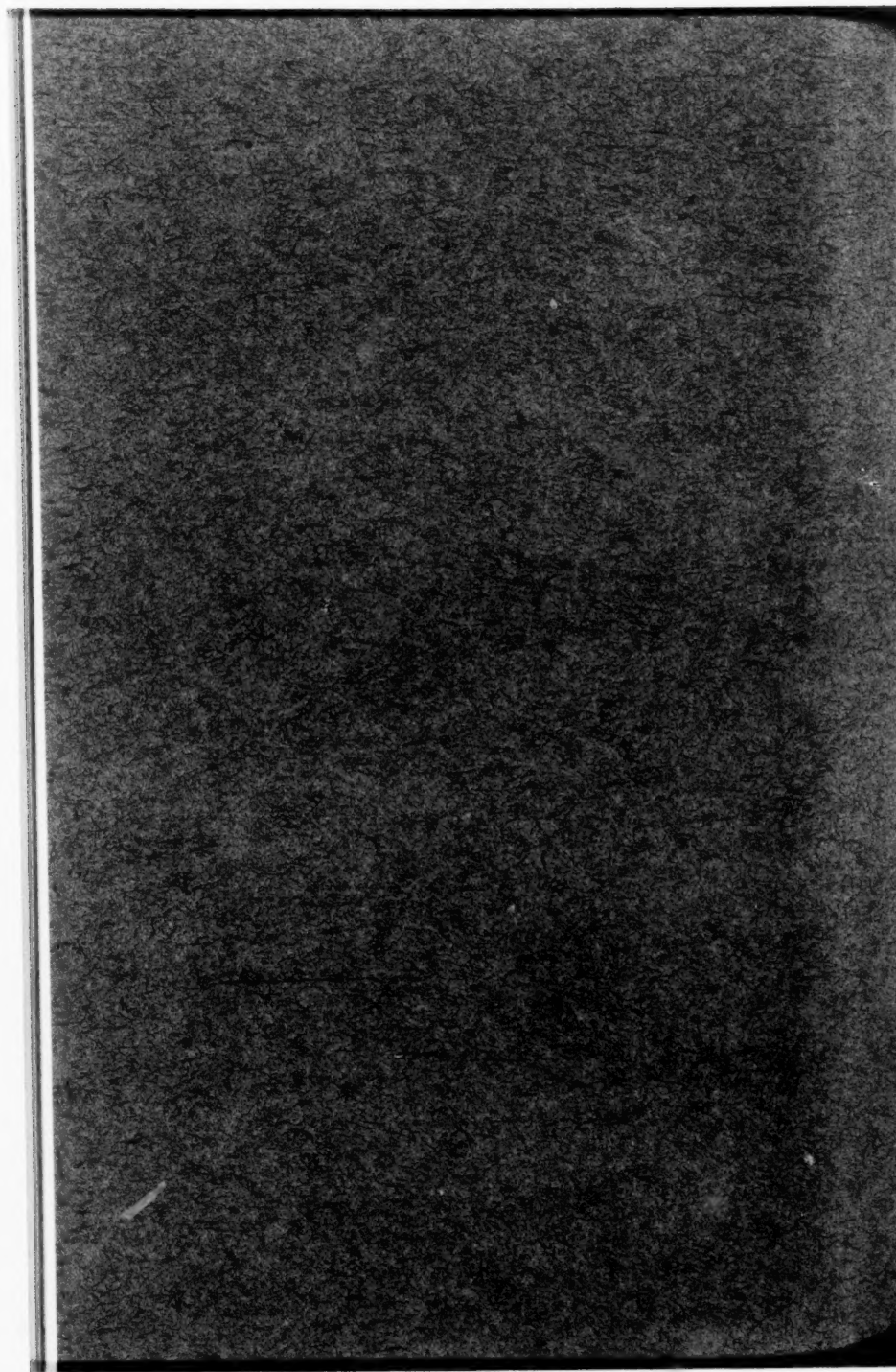
October Term, 1944

NEW YORK STATE UNIVERSITY, Respondent,
vs.
ALVIN L. BROWN, Petitioner.

CLAUDE W. WHELAN, Respondent, vs.
ALVIN L. BROWN, Petitioner.

ON PETITION FOR A WRIT OF HABEAS CORPUS IN THE UNITED
STATES DISTRICT COURT OF APPEALS FOR THE SECOND
CIRCUIT.

ALVIN L. BROWN, Petitioner.



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In the Supreme Court of the United States

OCTOBER TERM, 1944

No. 246

NEW YORK STATE GUERNSEY BREEDERS' CO-OPERATIVE, INC., PETITIONER

v.

CLAUDE R. WICKARD, SECRETARY OF AGRICULTURE
OF THE UNITED STATES

*ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED
STATES CIRCUIT COURT OF APPEALS FOR THE SECOND
CIRCUIT*

BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the district court on petitioner's original complaint (R. 7-26) and the district court's opinion on petitioner's amended and supplemental complaint (R. 97-106), filed following remand of the proceedings to the Secretary of Agriculture and further hearings and findings by the Secretary, are not reported. The opinion of the United States Circuit Court of Appeals for the Second Circuit (R. 135-146) is reported in 141 F. (2d) 805.

(1)

JURISDICTION

The judgment of the court below was entered on April 17, 1944 (R. 146-147). The petition for a writ of certiorari was filed July 11, 1944. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925 (28 U. S. C. sec. 347).

QUESTION PRESENTED

Whether the ruling of the Secretary of Agriculture refusing to amend his milk marketing order (Order No. 27) so as to grant to Guernsey milk either a special differential or exemption from the equalization provisions of said order conforms to the requirements of the Agricultural Marketing Agreement Act of 1937 or violates the due process clause of the Fifth Amendment.

STATUTE INVOLVED

The pertinent portions of Section 8c of the Agricultural Marketing Agreement Act of 1937, 50 Stat. 246, 7 U. S. C. sec. 608c (which re-enacted and amended the Agricultural Adjustment Act as amended, 48 Stat. 31; 48 Stat. 672; 49 Stat. 750), are set forth in the Appendix, *infra*.

STATEMENT

Petitioner is a cooperative association of dairy farmers producing milk from Guernsey cows and marketing such milk in the area covered by Order No. 27 (R. 62). This order, issued by the Secretary of Agriculture under the Agri-

cultural Marketing Agreement Act of 1937, regulates the handling of milk in the New York Metropolitan marketing area and became effective September 1, 1938 (following R. 86). Shortly thereafter petitioner, pursuant to Section 8c (15) (A) of the Act, filed with the Secretary a petition requesting that it either be exempted from the equalization provisions of the order or be granted an appropriate price differential "to be paid out of the equalization pool established under such order" (R. 107). The Secretary, after a hearing, denied this petition and petitioner, as authorized by Section 8c (15) (B) of the Act, then filed in the district court a bill to review the Secretary's ruling (R. 9-11). The Secretary, by counterclaim, requested enforcement of his order against petitioner and both parties filed motions for summary judgment (R. 7). The district court denied these motions and remanded the case to the Secretary for the making of new findings and conclusions, with the right of either party to present additional evidence (R. 37).

Following remand, additional evidence was taken and the Secretary made new findings and conclusions. The Secretary found¹ among other things:

¹ The findings are not in the printed record, but are included in the record before the Secretary which is before the Court as an original exhibit. Copies of the findings have been filed with the Clerk for distribution to the Court.

Of the dairy cattle in New York State, about 90% are Holstein and between 3% and 5% are Guernsey (Fng. 5). The latter are owned by some 2,000 farmers, of which about 450 are members of petitioner and sell their milk through it (Fngs. 1, 5). Petitioner is interested in developing the Guernsey breed of cattle and in advertising Guernsey milk and it uses for this purpose the trade name "Golden Guernsey", but between September 1938 and April 1940 less than 7% of petitioner's milk was marketed under this trade name (Fngs. 2-3). Except for its somewhat yellower color, Guernsey milk not marketed under some descriptive label has no distinguishing characteristic by which it can be identified by ordinary consumers and the latter cannot distinguish it by color when it is sold in opaque containers (Fng. 4).

Guernsey milk is, on the average, appreciably richer in butterfat, slightly richer in protein and mineral elements, and considerably richer in carotene than milk from Holstein or Ayrshire cows, but it is exceeded in some of these respects by milk from Jersey cows (Fng. 4). Guernsey milk, as compared with Holstein, "is not greatly, if at all different in total vitamin A potency (including convertible carotene)" (*ibid.*). Its average butterfat content is between 4.5 and 5% (*ibid.*). Order No. 27 has, from its inception, provided a butterfat differential of 4¢ for each

$\frac{1}{10}$ of 1% by which the butterfat content of a hundredweight of milk exceeds or falls below 3.5% (Fng. 7). This differential, which is not affected by the equalization provisions of the order, affords to petitioner's milk a butterfat premium of between 40¢ and 60¢ per hundredweight (*ibid.*).

Both before and after Order No. 27 became effective a greater percentage of petitioner's milk than of all milk on the market went into Class I uses and because of this fact petitioner prior to the order was generally able to return to its members a higher net price than non-members received (Fng. 6).

The Secretary concluded that the butterfat differential of Order No. 27 gave appropriate recognition to the provision of Section 8c (5) (B) (ii) of the statute permitting adjustment of uniform prices established by the Secretary by reason of "the grade or quality of the milk delivered." He also concluded that "Guernsey milk does not possess such special qualities and elements as to distinguish it from milk generally and as to require the Secretary to accord to it any special recognition" other than that which, by virtue of the butterfat differential of the order, he had already granted. The Secretary accordingly denied relief sought by petitioner.

Petitioner, with leave of the district court, filed an amended and supplemental complaint for

judicial review of the Secretary's second ruling (R. 58-74). The Secretary in his answer prayed, by way of counterclaim, for a mandatory injunction to require petitioner to comply with the provisions of Order No. 27 and to pay the amount due from it under the equalization provisions (section 927.7 (i)) of the order (R. 79-85).² The issues came before the court on cross motions for summary judgment. The court, holding that the Secretary's ruling was in accordance with law, entered a judgment dismissing petitioner's complaint and granting the injunction requested by the Secretary (R. 97-106, 112-114). The Circuit Court of Appeals affirmed this judgment (R. 146).

ARGUMENT

I

Petitioner contends that the Secretary's conclusion that Guernsey milk does not have such differentiating characteristics as to require exemption from his milk order or special treatment thereunder does not comply with the statutory provision that an adjustment may be allowed for

² The court had, by an order entered in February 1941, directed petitioner to establish a special bank account and to deposit therein the amount due from it under Section 927.7 (i) of the order for the delivery periods September 1938 through November 1940, and to deposit in the registry of the court amounts which should become due from it under this section for all future delivery periods, the sums so deposited to abide the final determination of the cause (R. 53, 55, 57).

"grade or quality." (Sec. 8c (5) (A)). The evidence shows that Guernsey milk is substantially richer in butterfat and to a slight extent in some other ingredients.³ Petitioner argues that an additional differential for quality beyond that allowed for butterfat should have been granted because of the other ingredients, and that the superior quality of its milk is indicated by higher production costs and greater consumer acceptance

³ The Secretary's finding in this connection was that:

4. Milk produced by Guernsey cows is, on the average, appreciably richer in butterfat, slightly richer in protein and mineral elements, somewhat yellower in color, and considerably richer in carotene than is milk produced by Holstein and Ayrshire cows under similar conditions. It is exceeded in some of these respects only by milk produced by Jersey cows. Milk produced by Guernsey cows has a lower content of "true" or "preformed" vitamin A than does milk produced by Holstein cows under similar conditions. Milk produced by Guernsey cows and milk produced by Holstein cows under similar conditions is not greatly, if at all different in total vitamin A potency (including convertible carotene). Milk of Guernsey cows, because of its comparatively high butterfat content (on the average, between 4.5 and 5 per centum) is not so suitable for infant feeding as are milks such as Holstein, with a lower butterfat content. Except for a somewhat yellower color, the milk of Guernsey cows not marketed under the "Golden Guernsey" label or trade-mark or under some other descriptive label has no distinguishing characteristic by which it can be identified by ordinary consumers. If Guernsey milk is in opaque containers, ordinary consumers cannot distinguish it by color.

than other milk.⁴ The Secretary considered these facts but ruled that they were not sufficient to establish that Guernsey milk is of "a grade or quality" substantially superior to other milk, except as manifested in the butterfat content for which allowance has been made.⁵ The Secretary and the court below both pointed out that higher production cost does not prove exceptional *quality*, and that consumer preference may be the product of various factors other than quality, such as extensive advertising, greater butterfat content (for which the order makes allowance), superior salesmanship (R. 143).

Under the statute (Sec. 8c (15) (A)), it is obviously for the Secretary to determine whether the additional ingredients in Guernsey milk (apart from the butterfat) are of sufficient importance to allow for a special differential. Such

⁴ It should be noted that inasmuch as the Act fixes only the minimum price it does not prevent petitioner from selling its milk at a higher price if the alleged greater quality is sufficient to permit it to do so. Petitioner does not seek an additional amount to be paid directly by the handlers, which would presumably have to be added by the handlers to their resale price and paid by the ultimate consumer, but an additional payment from the equalization fund, that is from the amount available for payment to producers generally; this would enable petitioner to sell at the same price as other milk.

⁵ Petitioner states "It has been proved, however, that those other solids consistently increase to some extent as the butterfat content increases" (Pet. 13). The allowance for additional butterfat content might thus be a convenient means of taking into account these other factors also.

a question is one calling for expert administrative judgment, and under the Act the administrative decision is final if "in accordance with law" (Section 8c (15) (B), *infra* p. 16). Here the Secretary's determination is supported by substantial evidence and is entirely reasonable. It cannot be said that he erred as a matter of law in concluding that the physical differences between Guernsey and other milk, higher production costs and consumer preference did not prove that petitioner was entitled to a quality differential in addition to the one granted. In these circumstances, his decision is binding upon the courts. *National Labor Relations Board v. Hearst Publications*, 322 U. S. 111; *Rochester Telephone Corp. v. United States*, 307 U. S. 125, 146; *Swayne & Hoyt Ltd. v. United States*, 300 U. S. 297, 304.

Furthermore, the question of the sufficiency of the evidence to support the administrative finding does not present an issue warranting review by this Court (*National Labor Relations Board v. Waterman Steamship Corp.*, 309 U. S. 206, 208), particularly when the administrative finding has been confirmed by two courts below. *International Association of Machinists v. National Labor Relations Board*, 311 U. S. 72, 75; *National Licorice Co. v. National Labor Relations Board*, 309 U. S. 350, 357; cf. *Pick Mfg. Co. v. General Motors Corp.*, 299 U. S. 3, 4.

II

Petitioner urges that Order No. 27 deprives it of property without due process because the equalization fund provision of the order prevents it from receiving any additional return on account of the greater percentage of its milk than of other milk which goes into Class I uses. This precise objection to Order No. 27 was considered in *United States v. Rock Royal Co-operative, Inc.*, 307 U. S. 533, 571-573, where it was argued that the pooling arrangement effected through the equalization fund was an unconstitutional deprivation of property "because handlers are not at liberty to pay the producer in accordance with the use of the producer's milk but must distribute the surplus to others whose milk was resold less advantageously." This Court, in upholding the constitutionality of the requirement, said (p. 572):

It [the pooling arrangement] is ancillary to the price regulation designed, as is the price provision, to foster, protect and encourage interstate commerce by smoothing out the difficulties of the surplus and cut-throat competition which burdened this marketing.⁶

⁶ It is pertinent to point out, in amplification of the above statement, that the equalization provisions of the order deal with the problem created by the surplus milk which must always be present in the market if the demands of consumers of fluid milk are to be adequately supplied. The burden of

Petitioner contends (Pet. 18) that the *Rock Royal* decision is not controlling because none of the litigants in that case asserted a right to a special differential. But the Secretary did not deny petitioner's application on the ground that differences in quality were immaterial, but on the ground of the insufficiency of the differences proved.

Petitioner also seems to urge (Pet. 15-16) that the butterfat differential which has remained the same since Order No. 27 was first adopted must be presumed to be arbitrary and, in its operation, violative of due process. We submit that petitioner is not in a position to raise such an issue. It is not among the grounds upon which review of the Secretary's ruling was requested (R. 67-68) and it was not presented in the administrative proceedings before the Secretary.⁷ Aside from this consideration, no factual showing is made that a butterfat differential cannot be fair unless it is correlated to cost of production. In the *Rock Royal* case this Court declared that differentials determined by the Secretary could not

this surplus is an indispensable incident of the business and must be shared equally by all engaged therein if recurrent disruptions of the industry are to be avoided.

⁷ The adequacy of the amount of the butterfat differential, which relates to milk in the marketing area generally and not just to Guernsey milk, is now before the Secretary in a proceeding involving proposed amendments to the New York milk order. See 9 Federal Register 8099, July 18, 1944.

be set aside merely on the basis of theoretical assumptions as to their unfairness. The Court said (pp. 567-568): "Such an administrative determination carries a presumption of the existence of a state of facts justifying the action far too strong to be overturned by such suggestions * * *."⁸

III

Petitioner asserts that the New York courts have, upon similar facts and under a similar statute, ruled that Guernsey milk is entitled to a special differential.⁹ The reaching of a different factual determination upon other evidence in other litigation manifestly does not establish error in the Secretary's determination. And insofar as any question of statutory interpretation is raised in this case, the construction which the New York courts have placed upon the statute of that State involves no question of conflict with the decision in the instant case. The New York statute (Agriculture and Markets Law, Article 21, Section 258-m (3)) contains a provision, lacking in the

⁸ The butterfat differential provided for in Order No. 27 is the same as the differential in effect in the New York milk market from 1917 up to the time this order became effective (Pet. 15). Accordingly, if it were proper to resort to inference in this matter, the most natural inference to draw from the prior practice is that the differential found in the order is not arbitrary or unreasonable.

⁹ The New York cases are cited in the opinion below at R. 144-145.

Federal act, that cost of production and other factors shall be taken into account in fixing milk prices. As the court below said, "the governing law there is somewhat different, the views of the various judges in New York appear to be quite divided, and as yet there has been no final disposition of the issue" (R. 144).

CONCLUSION

The decision below is correct and there is no conflict of decision. It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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AUGUST 1944.